IN THE

Supreme Court of the United States

October Term, 1948

No. 182

JOSEPH GIBONEY, HAROLD HACKELL, PAUL MANDALIA, SAM IPPOLITO, HARRY WESTON, WALTER DOWNEY, ROY UTTINGER, JAMES PIKE, TERRILL HENRY, A. J. JENKINS, Individually, and as President of the Ice and Coal Drivers and Handlers Local Union No. 953,

Appellants,

v.

EMPIRE STORAGE AND ICE COMPANY, *a Corporation.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI

AMICUS CURIAE MEMORANDUM ON BEHALF OF THE CONGRESS OF INDUSTRIAL ORGANIZATIONS AND ITS AFFILIATED ORGANIZATIONS

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The Congress of Industrial Organizations and its affiliated organizations file the within memorandum on behalf of their members because this case involves a threat to a right which is basic to the effective functioning of a free labor movement. The decision of the court below and the statute which it applies to this case seriously curtails the constitutional right to picket.

1. This case is but the most recent manifestation of a group of cases in which state courts and legislatures have sought to undermine the constitutional rights of working people to publicize the facts relating to industrial disputes. Attacks upon the right to picket have been forwarded by distorted definitions in state statutes of "labor dispute," by arbitrarily labeling the conduct of pickets illegal or coercive, and, as in this case, by embracing such conduct within common law definitions of restraint of trade.

We have in this case but another instance of the man-

ner in which a state supreme court has demonstrated its concern "only with the question whether there was involved a labor dispute within the meaning of the [state] statutes and assumed that the legality of the injunction followed from a determination that such a dispute was not involved." *Bakery & Pastry Drivers etc.* v. *Wohl*, 315 U. S. 769, 774. And, as in *American Federation of Labor* v. *Swing*, 312 U. S. 321, 325, this Court is "asked to sustain a decree which for purposes of this case asserts . . . that there can be no 'peaceful picketing or peaceful persuasion' in relation to any dispute between an employer and a trade union unless the employer's own employees are in controversy with him."

2. It is not only that the controlling legal doctrines which invalidate the decision below have been fully enunciated and developed by this Court. More than that, controversies factually similar to that which gives rise to this case are familiar to this Court. For disputes over the unionization of peddlers or vendors were examined in detail in *Milk Wagon Drivers* v. *Lake Valley Farm Products, Inc.*, 311 U. S. 91; *Milk Wagon Drivers* v. *Meadowmoor*, 312 U. S. 287, and *Bakery Drivers Union* v. *Wohl*, 315 U. S. 769. As in those cases we are dealing here with a problem which arises from the fact that non-union peddlers or vendors undermine the standards of wages or working conditions which the union has achieved for its members.

3. The competition of non-unionized peddlers or vendors of merchandise in breaking down established working standards is, as this Court has recognized, a source of serious labor disputes. Because of the high degree of mobility of the vendors and the essential difficulty of establishing effective working rules, working conditions in this area are subject to sharp deterioration. Organized drivers and helpers rapidly find that the standards achieved for them by the union are threatened with destruction by unorganized groups. Pressures upon working standards are generated by suppliers as well as customers. And even when standards are achieved, difficulties are created by problems of governance and policing. See, for example, *Milk Wagon Drivers* v. *Lake Valley Farm Products, Inc.*, *supra*; *Bakery Drivers Union* v. *Wohl*, *supra*;

Labor Aspects of the Chicago Milk Industry, Monthly Labor Review (June, 1942, p. 1283). Workers in this area, more perhaps than any single group in our economy, desperately need the protection of a union and free access to the mechanisms for concerted action to preserve their living standards.

4. The court below did not deny that the peddlers involved in this case enjoy a constitutional right to picket. Indeed, the court specifically stated that (R. 64) "There is nothing in the decree which restrains defendants from informing the public of any labor dispute they may have with the peddlers by any lawful means of dissemination of information, including picketing wherever same may be proper."

The court below did hold, however, that while the peddlers might pursue their legitimate objectives by marshaling public information in favor of their position they could not do so before the premises of the plaintiff below. It is apparent that the court deemed that the peddlers lost their rights to free speech when they sought to picket the Ice Company.

Thus, in attempting to distinguish the *Wohl* case, the court stated that while "both the baking companies which supplied the peddlers and customers of the peddlers, in some instances were picketed" the baking companies were not parties to the case and "the trial court found that no customers were turned away from the baking companies by reason of the picketing." Similarly, it pointed out that in the *Lake Valley* case the picketing was confined to the places of business of the peddlers' customers and that the dairies involved were not picketed. The court also sought to distinguish the *Magidow* case on the ground that there too the picketing was confined to the peddlers' customers.

It seems obvious that constitutional rights of vendors cannot be made to turn upon the fact that they are exercised in front of the establishment of their supplier rather than the establishment of the customer. As a regular and continuous matter a group of non-union vendors are subsidized in their resistance to the union by the Ice Company (R. 28). As far as appears from the record, the vendors deliver their wares to a scattered group of customers (R. 14). How can it be said under such circumstances that the union was required to pursue this

highly mobile non-union group to some other arena in order to marshal public opinion against its undermining of union standards?. If working men under the circumstances of the instant case are to enjoy the liberty of communication then surely picketing the Ice Company involved the "essential attributes of that liberty." *Near* v. *Minnesota*, 283 U. S. 697, 708.

The right of communication is not lost when its consequences are suffered by a supplier rather than a retailer, especially where as here it is the economic relationship of the supplier to the non-union peddlers which forms the basis for the threat to the union standards. It is the supplier who is, in the light of economic realities, the union's "real adversary." *Carpenter's Union* v. *Ritter's Cafe*, 315 U. S. 722, 727.

The limitations upon picketing established in the *Ritter's Cafe* case underline the appropriateness of picketing the economic enterprise which sustains the non-union peddlers. For this Court made it clear in that case that while the state may constitutionally insulate establishments which are industrially unrelated to the dispute, the Constitution would require a different result where as here a state seeks to exempt from the area of a labor dispute the very enterprise whose activities gave rise to it.

The court below improperly denied appellants right to picket by insisting in effect that it be exercised at a point or place where it would be ineffective in accomplishing its objective. It is obvious that the court below outlawed picketing because it effectively induced truck drivers to withhold their services from the Ice Company. In short, under the view of the court below, working men and women may enjoy free speech so long as they do not induce others to a course of action. But free speech would not be the precious right it is if the constitutional shield were withdrawn from it at the point where it invites men to a practical choice in the realm of conduct. *Abrams* v. *U. S.*, 250 U. S. 616, 630. As this Court held in *Thomas* v. *Collins*, 323 U. S. 516, 536-537, "'Free trade in ideas' means free trade in the opportunity to persuade to action not merely to describe facts."

The right to speak includes the right to speak under condi-

tions in which such speech will be meaningful and effective and this Court has pointed out, ". . . one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *New Jersey*, 308 U. S. 147, 163. Compare *Carlson* v. *California*, 310 U. S. 106.

The denial by the court below to appellants of the right to picket the Ice Company involves more than a denial of the right to speak. It also involves the right of those members of the public intimately affected by the controversy to hear the facts in a convenient and appropriate theater. Truck drivers whose working standards are directly menaced by the refusal of the non-union drivers to join the union surely have a right to be notified of such a controversy, vital to them and their livelihood, so that they may make effective choices with respect to the rendition of their services. The effect of the distinction made by the court below between picketing the supplier and the retailer is to deny easy access to a group directly affected by a controversy to the facts relating to that controversy and to deprive such group of the means of averting destruction of its group standards.

The decision below singles out a group of workers who desperately need the protections of group activity and denies them the means of making that activity effective; it deprives other workers in the same industry of an opportunity to hear and act upon grievances of fellow union members in the same industry and discriminatorily shelters one type of employer whose business activities make possible a breakdown of union standards from the economic consequences of his conduct.

5. Since this is a controversy involving unionization and the wages of helpers and not a commercial controversy in which the nexus is the price of a product (R. 44) even the court below did not, as do appellees here, rely on *Columbia River Packers Association* v. *Hinton*, 315 U. S. 143. However, the court below did single out two additional circumstances in its attempt to distinguish the vendor cases decided by this Court.

First, the court below urged that the *Wohl* case is distinguishable on the ground that it involved a struggle between two competing forms of distribution, namely, through em-

ployees of the company as against "vendors." But, contrary to the suggestion of the court below, the vendors in the *Wohl* case did not picket for the purpose of forcing a change in the distribution system of the baking company. There, as here, the object of the picketing was to unionize the vendors who occupied precisely the same relationship to the baking company as the peddlers in the instant case.

Finally, the court below sought to escape the impact of the vendor cases decided by this Court by emphasizing the fact that the employees of the Ice Company were already unionized. But the employees of the dairies involved in the *Lake Valley* case were likewise already unionized and this Court held that that circumstance did not deprive the picketing involved in that case of federal protection under the Norris-LaGuardia Act.

* * *

The picketing outlawed by the court below was in all respects peaceful and orderly. The standards which this Court has insisted must be met where freedom of expression is curtailed have not been met here. The judgment below should be reversed.

Respectfully submitted,

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